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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION

11 UNITED STATES OF AMERICA,) CV 07-2925 AHS
12) CR 97-562 AHS
13 Plaintiff/Respondent,)
14 v.) ORDER DENYING PETITIONER'S
15) MOTION TO VACATE, SET ASIDE
16 RAFAEL MAGALLON,) OR CORRECT SENTENCE UNDER 28
17) U.S.C. § 2255
18 Defendant/Petitioner.)
19 _____)
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21 I.

22 PROCEDURAL BACKGROUND

23 On September 29, 2005, Petitioner Rafael Magallon
24 ("Petitioner") pleaded guilty to Count Two of a ten-count
25 Indictment charging violations of 21 U.S.C. §§ 846 and 841(a)(1)
26 (conspiracy to manufacture, to possess with intent to distribute,
27 and to distribute methamphetamine). Petitioner was sentenced on
28 March 6, 2006. On March 16, 2006, Petitioner filed a Notice of
Appeal. On November 13, 2006, Petitioner's motion for voluntary
dismissal of the appeal was granted, and the appeal was dismissed.

On May 3, 2007, Petitioner filed the instant Motion to
Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. The

1 Court set a briefing schedule on May 18, 2007. On June 29, 2007,
2 Petitioner filed a supplement to the motion. On October 30, 2007,
3 the government filed opposition. Petitioner filed a
4 traverse/responding brief on December 21, 2007.

5 Based on the arguments and authorities in the parties'
6 papers and the Court's independent research, and having reviewed
7 petitioner's Pre-Sentence Report and the sentencing papers, the
8 Court denies Petitioner's § 2255 motion.

9 **II.**

10 **DISCUSSION**

11 **A. Legal Standard**

12 To prevail on a claim of ineffective assistance of
13 counsel, a defendant must show that, considering all of the
14 circumstances: (1) trial counsel's performance fell below an
15 objective standard of reasonableness; and (2) the ineffective
16 performance prejudiced defendant, that is, that there is a
17 reasonable probability that, but for counsel's errors, the result
18 of the proceeding would have been different. A reasonable
19 probability is a probability sufficient to undermine confidence in
20 the outcome. See Strickland v. Washington, 466 U.S. 668, 687-95,
21 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v.
22 Cochrane, 985 F.2d 1027 (9th Cir. 1993).

23 The reasonableness of counsel's performance is measured
24 "under prevailing professional norms." Strickland, 466 U.S. at
25 688. The second prong requires a showing that counsel's deficient
26 performance resulted in actual prejudice to defendant; that is,
27 defendant must show counsel acted unprofessionally with "a
28 probability sufficient to undermine confidence in the outcome."

1 See id. at 687, 694; Wiggins v. Smith, 539 U.S. 510, 518, 123 S.
2 Ct. 2527, 156 L. Ed. 2d 471 (2003). Counsel's performance is to be
3 evaluated in light of all of the circumstances at the time of the
4 alleged error. See United States v. Molina, 934 F.2d 1440, 1447
5 (9th Cir. 1991). In evaluating claims of ineffective assistance of
6 counsel, there is a strong presumption that counsel performed
7 adequately. Strickland, 466 U.S. at 689.

8 **B. Failure to Investigate**

9 Petitioner claims denial of effective assistance by his
10 counsel by failing to properly investigate and present the critical
11 nature of Petitioner's physical impairments. Had the Court been
12 presented with a full understanding of the extent of Petitioner's
13 ailments and needs, it would have granted a downward departure
14 pursuant to U.S.S.G. § 5H1.4 and/or an adjustment pursuant to 18
15 U.S.C. § 3553(a). (Mot. at 8.) Specifically, Petitioner argues
16 that effective counsel would have obtained and presented
17 Petitioner's medical records, including an expert review and a
18 summary of physical impairments. (Id. at 8-9.) Petitioner contends
19 that the extensive and expensive medical care he needs is more
20 likely available in a community setting than in a prison. (Mot. at
21 15.) Moreover, competent counsel would have presented testimony
22 regarding petitioner's extraordinary physical impairments. (Mot.
23 at 17.)

24 The Court does not, after evaluating counsel's
25 performance in light of all of the circumstances at the time of the
26 alleged error, conclude that Petitioner's counsel conducted an
27 insufficient investigation of Petitioner's health. Trial counsel
28 asked Petitioner about his health condition and asked him to

1 provide letters from his primary physician and any other medical
2 specialists. (Declaration of Ken K. Behzadi ("Behzadi Decl.") ¶
3 3.) Petitioner provided a letter from his primary care physician
4 indicating he "has a history of type 1 diabetes, hypertension, and
5 elevated cholesterol . . . [and] was recently diagnosed with a
6 kidney disorder" and was scheduled for further testing and
7 consultation with a specialist. (Mot. Ex. C.) This letter was
8 provided to the Court immediately before the sentencing hearing and
9 acknowledged by the Court. (Mot. Ex. A, p. 25.)

10 Petitioner's contention regarding adequate investigation
11 does not succeed because Petitioner does not show that his
12 condition constituted an extraordinary physical impairment at the
13 time of sentencing. See United States v. Martinez-Guerrero, 987
14 F.2d 618, 620 (9th Cir. 1992) (refusing downward departure where
15 the prison can accommodate the impairment). Petitioner offers no
16 evidence that at the time of sentencing Petitioner was suffering
17 from renal failure or that Petitioner's illnesses made him
18 "seriously infirm" such that departure based on physical condition
19 would be likely. U.S.S.G. § 5H1.4. Accordingly, Petitioner does
20 not show that he was prejudiced by counsel's failure to conduct
21 additional investigation. See Strickland, 466 U.S. at 694; Shah v.
22 United States, 878 F.2d 1156, 1162 (9th Cir. 1989) (stating that
23 failure to raise a meritless legal argument does not constitute
24 ineffective assistance of counsel).

25 **C. Downward Departure or Sentencing Variance**

26 Petitioner also asserts effective counsel would have
27 argued other *Booker* factors including his age and status as a
28 first-time offender who "had learned his lesson and was adequately

1 deterred by the experience of the criminal case." (Mot. at pp. 14,
2 15.) Petitioner believes such information would have merited a
3 non-custodial sentence or significantly lower sentence. (Mot. at
4 pp. 11, 14.)

5 The Court's ruling at the sentencing hearing and trial
6 counsel's advocacy at sentencing contradict Petitioner's allegation
7 that his counsel failed to request a lesser sentence based on
8 criminal and personal history. Specifically, both the Court's
9 ruling and counsel's arguments indicate that Petitioner requested a
10 downward departure for "aberrant behavior" in light of the fact
11 that (1) this was his first conviction; (2) the crime was committed
12 seven years earlier; and (3) his work history. (See Mot. Ex. A,
13 pp. 26-7.)

14 While a motion for departure under U.S.S.G. § 5H1.4 was
15 not made, Petitioner's counsel ensured that information regarding
16 Petitioner's poor health was before the Court during sentencing.
17 Petitioner's position on sentencing pointed out that Petitioner
18 "suffer[s] from a variety of serious illnesses including diabetes,
19 high blood pressure, and kidney complications . . ." (Opp. at 27.)
20 In asking for a downward departure, the position on sentencing also
21 requested the Court "consider his non-existent criminal record,
22 before this case . . . and the fact that he has numerous serious
23 illnesses." (Id.) At sentencing, Petitioner's counsel verbally
24 reiterated petitioner's "lack of criminal history" and "numerous
25 serious illnesses" in support of the request for downward
26 departure. (Mot. Exh. A, p. 27.)

27 The Court noted in its ruling that Petitioner requested a
28 downward departure to reflect the impact of his incarceration on

1 his family, his having no criminal history but having a steady job,
2 and his numerous illnesses. (Ruling at 3.)

3 The Court's tentative ruling and statements at sentencing
4 suggest that, despite arguments in support of a downward departure,
5 sentencing variance, or other bases for a lesser sentence, the
6 Court found Petitioner's actions following the offense and his role
7 in the offense justified no further reductions or adjustments. In
8 making its ruling, the Court noted it took "into account that
9 defendant left the country after committing his offense and avoided
10 punishment for years." (Ruling at 4.) At sentencing the Court
11 noted Petitioner's role "as an insider at the airport" "was fairly
12 critical to help achieve the goals of the conspiracy." (Mot. Ex.
13 A, p. 32.) The Court concluded that while 70 months "is a
14 significant sentence," "it is a fair and just sentence under all
15 the circumstances." (Mot. Ex. A, p. 32.)

16 III.

17 CONCLUSION

18 The Court concludes that the motion is appropriate for
19 decision without an evidentiary hearing. A district court may deny
20 a § 2255 motion without holding an evidentiary hearing when the
21 record clearly establishes that the Petitioner is not entitled to
22 relief or that the motion presents no more than allegations
23 unsupported by the facts or refuted by the record. United States
24 v. Quan, 789 F.2d 711, 715 (9th Cir. 1986).

25 Having reviewed the parties' papers and the exhibits in
26 question, the Court finds that Petitioner does not establish that
27 his trial counsel provided him with ineffective representation
28 resulting in prejudice. Petitioner's allegations are refuted by

1 the record.

2 For the foregoing reasons, the Court denies petitioner's
3 Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. §
4 2255.

5 IT IS SO ORDERED.

6 IT IS FURTHER ORDERED that the Clerk shall serve a copy
7 of this Order on counsel for all parties in this action.

8 DATED: May 9, 2008.

9 **ALICEMARIE H. STOTLER**

10 ALICEMARIE H. STOTLER
11 CHIEF U.S. DISTRICT JUDGE
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